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No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1961

MILK TRANSPORT, INC., Apellant,

vs.

UNITED STATES of AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE

on behalf of

W. W. HUGHES d/b/a W. W. HUGHES
REFRIGERATED SERVICE

Harold S. Shertz
Paul F. Barnes
226 South Sixteenth Street
Shertz, Barnes & Shertz
Philadelphia 2, Pennsylvania

September 1, 1961

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF W. W: HUGHES, d/b/a W. W. HUGHES REFRIGERATED SERVICE

TO THE HONORABLE, THE CHIEF JUSTICE AND JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

W. W. Hughes d/b/a W. W. Hughes Refrigerated Service hereafter called Hughes files this his motion for leave to file a brief amicus curiae prior to the consideration of the jurisdictional statement of appellant, Milk Transport, Inc., which is presently before your Honorable Court and in which case a motion to affirm has been filed by the United States of America and the Interstate Commerce Commission and answer thereto likewise having been timely filed by Milk Transport, Inc.

Hughes bases his motion for leave to file a brief amicus curiae on the facts recited below. The factual matters are all contained in the public records of the Interstate Commerce Commission.

Hughes filed an application with the Interstate Commerce Commission at Docket No. MC-105782, Sub 4, on December 8, 1958 seeking authority under the "grandfather" provision of Section 7 of the Transportation Act of 1958, 72 Stat. 573 (1958) 49U.S.C. § 303 (b) (6) (1958) to conduct operation in interstate or foreign commerce as a common carrier by motor vehicle over irregular routes between all points in the continental United States of any and all commodities shown in the Commodity List whether listed as exempt or not exempt incorporated in Administrative Ruling numbered 107, March 19, 1958, of the Bureau of Motor Carriers, Interstate Commerce Commission.

The application was assigned for hearing at Washington, D. C. on January 19, 1960. The Examiner to whom the matter was assigned issued a Recommended Report and Order

which was served on April 18, 1961. The proceeding is presently pending before the Interstate Commerce Commission by reason of exceptions to be filed both by Hughes and others supporting and opposing the application.

By petition dated June 29, 1961 the United States Department of Interior filed a petition for leave to intervene in the proceeding. By petition filed June 30, 1961 the National Fisheries Institute Inc., the same being a national trade association with offices at 1614 — 20th Street, N. W., Washington, D. C. This trade association is comprised of firms and local trade associations engaged in the business of shipping, receiving, producing, processing, wholesaling and retailing fishery products throughout the United States. By Order dated July 25, 1961 the Interstate Commerce Commission permitted the United States Department of Interior and the National Fisheries Institute Inc. to intervene and exceptions have been filed by them *in support* of the application of Hughes.

As shown in the Report and Order of the Examiner in the Hughes "grandfather" application, referred to above, at Docket No. MC-105782, Sub 4, Hughes is serving some 476 shippers and receivers of fresh, cold packed and frozen foods to and from and between all points in the continental United States. Likewise the ultimate consumers of these foods involves millions of people throughout the entire United States.

In the jurisdictional statement of Milk Transport, Inc., appellant in the present proceeding, the first question presented is as follows:

> "(1) Are the 'grandfather' and 'interim' provisions of § 7 (c) of the Transportation Act of 1958 applicable only to application for certificates to transport the 11 specified commodities in the second proviso of § 7 (a) of the Transportation Act of 1958, as was decided by the lower court, or, are said 'grandfather' and 'interim' provisions applicable to applications for certificates to transport *all* commodities 'made subject to' Part II of the Interstate Commerce Act by *both* the

first and second provisos of § 7 (a) of the Act of 1958, including citrus juices?"

The same issue is being litigated by Hughes before the Interstate Commerce Commission at the present time and specific ruling as to what commodities are subject to the "grandfather" provisions of Section 7 of the Transportation Act of 1958 is the primary legal issue involved. No final decision has been rendered.

In accordance with instructions from the Interstate Commerce Commission and with the applicable law, Hughes filed a tariff on December 8, 1958 to become effective January 7, 1959 setting forth rates and rules and regulations for the transportation of all commodities shown in the Commodity List whether listed as exempt or not exempt as incorporated in Administrative Ruling numbered 107, of the Bureau of Motor Carrier, Interstate Commerce Commission. This tariff was suspended and vacated by the Interstate Commerce Commission by Order dated June 15, 1960 effective August 5, 1960. Thereafter Hughes filed a complaint in the nature of an appeal in the United States District Court for the Eastern District of Pennsylvania in a proceeding captioned *W. W. Hughes d/b/a W. W. Hughes Refrigerated Service v. United States of America and Interstate Commerce Commission*, Civil Action No. 28304. By Order dated September 30, 1960 this statutory court enjoined the Interstate Commerce Commission from suspending or vacating the tariff of Hughes which in effect allows him to perform transportation between any and all points within the continental United States of not only the 11 commodities specified in the second proviso of Section 7 (a) of the Transportation Act of 1958 but any and all of the many and numerous commodities specified and listed in the Commodity List of Administrative Ruling numbered 107, of the Bureau of Motor Carriers, Interstate Commerce Commission, whether such commodities are listed as exempt or not exempt. This injunction is to remain in full force and effect until the Interstate Commerce Commission has finally decided whether or not

Hughes is entitled to "grandfather" authority for not only the 11 commodities enumerated in the second proviso of Section 7 (a) of the Transportation Act of 1958 or of all of the numerous enumerated commodities shown in the Administrative Ruling numbered 107, of the Bureau of Motor Carriers, Interstate Commerce Commission, which is made subject to the entire provisions of Section 7 (a) of the Transportation Act of 1958.

The present appeal therefore will not only determine the extent that appellant is authorized to apply for "grandfather" authority under Section 7 (a) of the Transportation Act of 1958 but also the extent that "grandfather" authority may be requested by Hughes and the many hundreds of other carriers in like circumstances. If the motion to affirm be allowed, it might well be Hughes would have to cease all operations other than the 11 specified commodities and be forever precluded from prosecuting his case and continuing his operation as required to obtain "grandfather" authority. Likewise, the United States Department of Interior has intervened in the Hughes proceeding and has an interest in the outcome of the present appeal as well as the National Fisheries Institute Inc. and, as stated above, the problem involves transportation at least insofar as Hughes is concerned of all the numerous commodities listed in the Commodity List of Administrative Ruling numbered 107, of the Bureau of Motor Carriers, Interstate Commerce Commission between all points in the continental United States and also involves whether or not adequate motor carrier service will be allowed to continue to be available throughout the entire United States involving as set forth supra some 476 producers and receivers and millions of ultimate consumers.

A complete interpretation of paragraph 203 (b) (6) of Part II of the Interstate Commerce Act, 72 Stat. 573-74 (1958) (49 U.S.C. § 303 (b) (6) 1958), both before and after its amendment by Section 7 (a) of the Transportation Act of 1958 should once and for all be decided after oral

argument and proper presentation of all the facts and law to your Honorable Court. Perhaps the confusion concerning the interpretation of the commodities which are exempt and which are not exempt both prior and after the amendment of Section 7 (a) of the Transportation Act of 1958 can best be summed up in the following quotation in the opinion of Judge Graven of the District Court for the Eastern Division of the Northern District of Iowa in *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599, (E. D. Iowa) *affirmed* 212 F. 2 cd 554 (8th Cir.), *cert. denied*, 348 U.S. 836 (1954). Said Judge Graven at page 601:

> "This particular case is but one engagement of a much larger battle that has been raging for many years. The battle commenced when legislation was proposed granting regulatory powers to the Interstate Commerce Commission as to interstate transportation of motor vehicles and has continued ever since. . . ."

The above facts set forth the interest of Hughes, the Unted States Department of Interior and the public of the United States. Although arguments on the issues involved have been set forth in the pleading heretofore filed by the parties of record nevertheless it is the belief of Hughes that the other parties have not set forth in their pleadings and briefs certain arguments which are controlling; nor called attention to various decision and constitutional positions which are necessary for proper decision of the issues herein. Likewise any decision in this matter may well preclude Hughes from further litigation of his pending proceedings without opportunity to be heard unless a brief amicus curiae be permitted to be filed. The accompanying brief will not duplicate the arguments heretofore filed by the parties of record.

Respectfully submitted,

OF COUNSEL:
Shertz, Barnes & Shertz
226 S. 16th Street
Philadelphia 2, Pa.

Harold S. Shertz
Paul F. Barnes

No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1961

MILK TRANSPORT, INC., Apellant,

vs.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF AMICUS CURIAE

on behalf of

W. W. HUGHES d/b/a W. W. HUGHES REFRIGERATED SERVICE

TO THE HONORABLE, THE CHIEF JUSTICE AND JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT

The interest of W. W. Hughes d/b/a W. W. Hughes Refrigerated Service has been set forth in the petition for leave to file this brief and will not be repeated here. The question of law involved is set forth in the "Questions Presented by Appeal" on page 3 of the Jurisdictional statement filed by Milk Transport, Inc., appellant. The issue is as follows:

> "(1) Are the 'grandfather' and 'interim' provisions of § 7 (c) of the Transportation Act of 1958, applicable only to applications for certificates to transport the 11 specified commodities in the second proviso of § 7 (a) of the Transportation Act of 1958, as was decided by the lower court, or, are said 'grandfather' and 'interim' provisions applicable to applications for certificates to transport *all* commodities 'made subject to Part II of the Interstate Commerce Act by both

the first and second provisos § 7 (a) of the Act of 1958, including citrus juices?"

ARGUMENT

It is true that the present appeal involves a narrow issue relating to Section 7 (a) and Section 7 (c) of the Transportation Act of 1958, 72 Stat. 573-74 (1958), 49 U.S.C. § 303 (b) (6) (1958). However, the conclusions reached by the three judge statutory court below and the position of the United States of America and the Interstate Commerce Commission are erroneous and unsound and indicate that the issues involved apparently have not been fully understood. In order to properly comprehend the issues involved and to reach a equitable, logical and legal result, the two sections of the Transportation Act of 1958, namely § 7 (a) and 7 (c), must be considered in relation to each other. We will first consider Section 7 (a) of the Transportation Act of 1958 to set forth what was intended to be accomplished thereby. We will then appraise and analyze Section 7 (c) of the Transportation Act of 1958 with the purpose of Section 7 (a) in mind and interpret this section in the plain words set forth therein without attempting to administratively or judicially amend or implement this Section of the Act to reach a strained, illegal, inequitable and illogical result as has the court below, the United States of America and the Interstate Commerce Commission have done.

As is admitted by all parties and has been so adequately set forth in *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599,601 (E. D. Iowa 1953), there has raged for many years a battle within the Interstate Commerce Commission, other agencies of the United States Government and in the federal courts regarding the proper interpretation of the agricultural and fish exemptions which are in issue here.

In an attempt to once and for all resolve the conflicts of interpretation, Congress passed the Transportation Act of 1958. The amendment to Section 203 (b) (6) as contained

in the Transportation Act of 1958 was divided into three sections. Section 7 (a) and Section 7 (c) are the ones here pertinent.

It is agreed by all parties including Hughes that Section 7 (a) intended to provide future economic regulation for all carriers performing transportation of all of the numerous not exempt commodities mentioned and enumerated in the Commodity List of Administrative Ruling No. 107 of the Bureau of Motor Carriers, Interstate Commerce Commission. Also to be regulated is the transportation of exempt commodities when transported in the same vehicle with not exempt commodities. This will be discussed more fully below. Section 7 (a) is clear in this respect. It is also clear beyond argument that the economic regulation of those commodities listed as not exempt in the Commodity List of Administrative Ruling No. 107, was intended to apply to the future only. Congress did not intend nor does a plain reading of the statute infer or prescribe in any way the status of the commodities prior to the effective date of Section 7 (a) of the Transportation Act of 1958. The word "shall" prefixes each and every provisio of Section 7 (a).

Administrative Ruling No. 107 was not an enforciable order of the Interstate Commerce Commission, and was merely advisory and tentative. It was not binding upon the Interstate Commerce Commission itself or outside parties. See *Lesnewsky-Purchase-Rojeske*, 45 M.C.C. 739, 744 (1947); *Teletype, Telegraph and Telephone Service, Oregon and Washington*, 16 M.C.C. 521, 526 (1939). The preface containing the rule itself provides as follows: "The Bureau opinions' in this ruling are tentative and provisional and are made in the absence of authorative Commission or court decisions. . . " Likewise Administrative Ruling No. 110 which proports to interpret Ruling No. 107 states "rulings of this kind are tentative and provisional, and are made in the absence of authorative decisions upon the subject by the Commission". *It is also well to note that Administrative Ruling* No. 107 *of the Bureau of Motor*

Carriers, Interstate Commerce Commission was not an Order of Interstate Commerce Commission, as of the effective date of the *Transportation Act of* 1958. Likewise, the bases for giving the status of exempt or not exempt to the commodities listed therein were in most cases only opinions of Bureau of Motor Carrier or Interstate Commerce Commission decision. Court decisions which are cited as authority for the status of a commodity represent reversals of the interpretations of the Interstate Commerce Commission.

The authority for tentatively prescribing the status of exempt or not exempt of many of the commodities listed in Administrative Ruling numbered 107 of the Bureau of Motor Carriers Interstate Commerce Commission is based on Case 7 with Note 6 explaining. Case 7 is a application of W. W. Hughes pending before the Interstate Commerce Commission. Note 6 which is a part of Administrative Ruling numbered 107 states the proceeding in W. W. Hughes has been reopened and Case 7 cannot be considered as authorative.

It thus appears obvious that the purpose of Section 7 (a) of the Transportation Act of 1958 was merely to proclaim once and for all the future status of the various numerous agricultural and fish commodities contained in Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission. But Congress did more than just adopt Administrative Ruling numbered 107. Congress specifically named certain commodities which should be exempt or not exempt regardless of how listed in the Commodities List of the Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission. Congress did not only specifically enumerate the eleven (11) commodities that should be not-exempt regardless of Administrative Ruling numbered 107, but also stated that the rule would not be controlling as to "cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not includ-

ing fish or shell fish which had been treated for preserving, such an canned, smoked, pickled, spiced, corned, or kippered products)". Although the court below, the United States Government and the Interstate Commerce Commission somehow believe that the eleven (11) first enumerated commodities are the only ones specially treated, nevertheless the full reading of Section 7 (a) specifically states otherwise and points out the error of judgment and interpretation which has heretofore been given to interpretations of this Section of the Act.

Having determined the motive, reason and proper interpretation of Section 7 (a) of the Transportation Act of 1958, it is well to state that the many carriers wishing to transport the commodities made subject to economic regulation by Section 7 (a) must in the future file an application for a certificate upon proving public convenience and necessity under Section 207 of Part II of the Interstate Commerce Act (49 U.S.C. 307). However those carriers who prior and subsequent to the enactment of Section 7 (a) had been transporting the commodities made subject to the provisions of such section were allowed to continue doing so under the "grandfather" provisions of Section 7 (c) The purpose of Section 7 (c) of the Transportation Act of 1958 is obviously for the purpose of permitting a carrier who in good faith had performed transportation of the commodities made subject to future economic regulation to continue in this business in which he had invested years of his life and money in performing a transportaton service to the producing, distributing and consuming public. Congress in its fairness would not have attempted and did not attempt to legislate carriers out of business who were performing such transportation in good faith prior to and subsequent to the effective date of the Transportation Act of 1958. To interpret Section 7 (c) of the Transportation Act of 1958 otherwise would indeed be unconsitutional and would amount to the taking of property without due process of law. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, (1893); *Harriman v. Inter-*

Commerce Commission, 211 U.S. 407, 422, (1908).

Prudential Insurance Co. v. Benjamin, 328 U.S. 408, is cited by the United States of America and the Interstate Commerce Commission for authority that there is no necessity for Congress to confer "grandfather" rights. A review of this case reveals no applicability whatsoever for the statement of law for which it was cited.

Section 7 (c) of the Transportation Act of 1958 provides that any carrier who was in bona fide operation "on May 1, 1958 in the transportation of property. . . made subject to the provisions of Part II of that Act by paragraph (a) of this section, . . and has so operated since that time. . . " be issued a certificate to continue such operations. The phase "Part II of that Act" refers to Part II of the Interstate Commerce Act (49 U.S.C.A. § 301-28). This phrase "paragraph (a) of this section" refers to Section 7 (a) of the Transportation Act of 1958 which amended Section 203 (b) (6) of Part II of the Interstate Commerce Act, the agricultural and fish commodity exemption clause of the Federal Motor Carrier Act.

It thus becomes important to interpret Section 7 (c) of the Transportation Act of 1958 according to the plain unambiguous words set forth therein.

The court below adopted the position of the United States Government and the Interstate Commerce Commission that "grandfather" authority is only authorized for eleven (11) of the (17) enumerated commodities listed specifically in the second proviso of Section 7 (a) of the Transportation Act of 1958. This is the cardinal error for they have ignored the plain language of the Act. No justification exists for their interpretation. In order to reach such a conclusion Section 7 (c) of the Transportation Act of 1958 would have to be jurisdictionally, administratively or now by argument of the parties rewritten in the following respects:

(a) The phrase in Section 7 (c) reading "... in the transportation of property. . ." would have to be re-

written to read ". . . in the transportation of *formerly exempt* property. . .". There is no justification for prefixing the words formerly exempt in the description of the property for which "grandfather" rights are plainly authorized. Section 7 (c) of the Transportation Act of 1958 clearly provides for "grandfather" rights for all property subject to the provisions of Section 7 (a), namely all property enumerated in the Commodity List of Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission, whether therein designated exempt or not exempt and as modified in the second proviso. A certificate is required to transport *exempt* property as well as not exempt property if the exempt property is transported in the same vehicle with not exempt property. Section 203 (b) (6) of Part II of the Interstate Commerce Act specifically provides both prior to and after the Transportation Act of 1958 that exempt property may only be transported without a certificate ". . . if such motor vehicles are not used in carrying any other property. . . for compensation. . . ".

(b) The court below, would have the Act interpreted and rewritten so as not to grant "grandfather" authority for all property subject to the provisions of Section 7 (a) of the Transportation Act of 1958 but to only those commodities "*returned to regulation*" by the second proviso of Section 7 (a) of the Transportation Act of 1958. Nowhere in the Act can it be inferred that there was every intended nor are there any words that can be interperted to mean that "grandfather" rights would be granted for only those commodities 'returned to regulation". These commodities were not "returned to regulation". They never were under lawful regulation by the Interstate Commerce Commission as it has judicially been de-

cided they were always exempt. *Home Transfer & Storage Co. v. United States*, 141 F. Supp. 599 (W. D. Wash.) *aff'd.* 352 U.S. 884 (1956); *Frozen Food Express v. United States*, 148 F. Supp. 399, (S. D. Texas, 1956) *aff'd per curiam* 355 U.S. 6 (1957); *Interstate Commerce Commission v. Wagner*, 112 F. Supp. 109 (M. D. Tenn. 1953). The second proviso of Section 7 (a) of the Transportation Act of 1958 specifically enumerates and brings under regulation not only the eleven (11) enumerated commodities referred to above but also fish and shell fish which have been treated for prserving, such as canned, smoked, pickled, spiced, corned, or kippered products. It is contended by the Interstate Commerce Commission and the Department of Justice that these commodities although not exempt would not be subject to "grandfather" rights. This in spite of the fact that such commodities were in fact exempt prior to enactment of the Transportation Act of 1958.

(c) The court below, the United States Government and the Interstate Commerce Commission have erred and would in reaching their conclusions and presenting their argument rewrite the provisions of Section 7 (c) of the Transportation Act of 1958 in that they ignore the plain language of Section 7 (c) which provides that all property whether exempt or not exempt is subject to the granting of "grandfather" authority if such property is subject to the (entire) provision of Section 7 (a) of the Transportation Act of 1958. The court below, the United States Government and the Interstate Commerce Commission would rewrite the Act by providing that "grandfather" authority should only be granted to those eleven (11) commodities of the 17 made subject to the second proviso of Section 7 (a) of the Transportation Act of 1958, the amendment to

Section 203 (b) (6) of Part II of the Interstate Comerce Act. Nowhere are there any words nor is there any evidence that it was ever intended that only "grandfather" authority should be granted for those eleven (11) commodities of the 17 listed in the second proviso of Section 7 (a) of the Transportation Act of 1958. Section 7 (c) is clear in that it provides "grandfather" rights for property (whether previously exempt or not exempt) made subject to the "provisions of Part II of that Act by paragraph (a) of this section". (This section being the entire provisions of 7 (a) of the Transportation Act of 1958.) Since the status of the commodities shown in the Commodity List of Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission, had never been definitely established, except in the few court decisions, the very purpose of Section 7 (a) of the Transportation Act of 1958 was to make all of the listed commodities subject to its provisions. This was done primarily by the first proviso not the second proviso. The second provision merely made some specific deviations from all the numerous other commodities made subject to the first proviso.

Thus it appears that the court below, could only possibly sustain their position by the rewriting of Section 7 (c) of the Transportation Act of 1958 as shown above. Likewise as shown above, the Court below, failed to properly approach the problem, namely in interpreting the Transportation Act of 1958 they have ignored first in determining the purpose of Section 7 (a) of the Transportation Act of 1958 as it was intended and then secondly in interpreting Section 7 (c) not only as it was intended but by ignoring the clear and unambiguous language of Section 7 (c) as contained therein.

In order to portray and present to your Honorable Court the actual effect that adoption of the interpretation of the

court below, it might be well to rewrite Section 7 (c) of the Transportation Act of 1958 as they would have it done. The words in italics are the words that would have to be added to Section 7(c) of the Transportation Act of 1958 if the position of the lower court, the United States Government and the Interstate Commerce Commission were to be sustained as they would interpret and rewrite Section 7 (c) of the Transportation Act of 1958. Insofar as such section is pertinent it would then read as follows:

STATUTE AS IT WOULD HAVE TO BE REWRITTEN

". . . if any person. . . was in bona fide operation. . . in the transportation of *formerly exempt* property *returned to regulation* for compensation by motor vehicle made subject to the provisions of Part II of that Act by *the second proviso* of paragraph (a) of this section. . .".

Noted below are two brief comments on other issues inserted in the Motion to Affirm.

The United States Government and the Interstate Commerce Commission in their brief in support of the motion to affirm state as follows at page 7:

> "The flaw in this argument is that the first proviso, unlike the second, does not purport to subject any type of previously exempt transportation to Commission regulation. It merely continues the status as exempt or non-exempt of various commodities previously classified by the Commission on the basis of then controlling interpretations of the Act. (footnote omitted)"

Actually this statement is incorrect and not in accordance with the plain language of Section 7 (a) of the Transportation Act of 1958.

At page 9 of the brief *Inland Motor Freight* "*Grand-*

father" Application, 83 M.C.C. 543 (1960) is cited. Reference to this case clearly establishes that even the Interstate Commerce Commission has decided that carriers are entitled to "grandfather" rights which are not specifically listed or enumerated in the second proviso of Section 7 (a) of the Transportation Act of 1958. The language recited in the Interstate Commerce Commission decision states that only "grandfather" authority may be granted for the commodities enumerated in the second proviso. However, the logic set forth in the decision is faulty and not substantiated by reason or the plain words of the statute. In that case, "grandfather" authority was granted to transport fresh fruit when transported in the same vehicle with any of the eleven (11) specifically listed and enumerated commodities. However reference to the commodities listed in the second proviso of Section 7 (a) of the Transportation Act of 1958 reveals that there is not listed specifically or by inference "fresh fruits". The only interpretation of the statute that would permit "grandfather" authority under the reasoning of the Interstate Commerce Commission for "fresh fruits" would be that the same are made subject to the first proviso of Section 7 (a) of the Transportation Act of 1958. Hughes agrees that "grandfather" rights are authorized where exempt commodities are co-mingled with such commodities as are now not exempt. But in order to obtain and be entitled to such "grandfather" authority these exempt commodities must be subject to the provisions of the first proviso of Section 7 (a) of the Transportation Act of 1958 since these commodities are not specifically enumerated in the second proviso of Section 7 (a) of the Transportation Act of 1958. The illogical reasoning of the Interstate Commerce Commission in the decision cited above substantiates the position taken here. Likewise it might be well to quote from said decision wherein it was stated at Page 545:

"The purpose of the enactment by Congress of the

portions of the Transportation Act of 1958 here pertinent clearly is to secure to existing carriers their right to operating authority coextensive with their prior lawful operations,. . ."

Perhaps another one of the issues injected into the proceeding by the United States Government and the Interstate Commerce Commission need be commented on. In a very brief statement it is contended that the legislative history of the Transportation Act of 1958 removes any doubt as to what commodities are subject to "grandfather" authority. No statement could be further from the truth. The legislative history of the Transportation Act of 1958 involves numerous and lengthy debates by members of both the United States Senate and the United States House of Representatives as well as various Committee reports of Congress. The United States Government and the Interstate Commerce Commission in their brief have seen fit to quote only some twenty lines from a report originating in the House of Representatives. These twenty lines are taken out of the context insofar as the entire report is concerned and obviously could not possibly show the intent if any is shown of the Senate or even of the final bill as it was presented to both the House and Senate for passage.

The Congressional Record prior to the passage of the Transportation Act of 1958 has been carefully reviewed. Various phrases taken out of context could possibly be used favorably by any of the parties to this appeal. However little or no help can possibly be gained from the congressional history due to the various conflicts of interest of those presenting their views. That portion of the House Report contained in the twenty lines in the brief of the United States Government and the Interstate Commerce Commission even on its face could be used to support the view that it was intended that economic regulation be provided for those carriers who wish to transport in the future frozen fruits, frozen

berries, frozen vegetables, coffee, tea cocoa, hemp, imported wool and certain categories of domestic wool. These twenty lines do not purport to show that other commodities were not likewise to be made subject to economic regulaion. As a matter of fact the second proviso of Sction 7 (a) of the Transportation Act of 1958 does not only specifically enumerate these eleven (11) commodities but also some six (6) other commodities which were made subject to economic regulation. A complete reading of the Congrssional Record if it were appropriate would substantiate the position taken in this brief, namely that all commodities listed in Administrative Ruling No. 107, were intended to be made subject to the first proviso of Section 7 (a) of the Transportation Act of 1958. Exempt commodities were to be made subject to economic regulation if co-mingled and transported in the same vehicle as those specifically designated not exempt

In any event whereas here th plain language of Section 7 (a) and Section 7 (c) of the Transportation Act of 1958 is unambiguous and of definite and positive interpretation, the legislative history becomes unimportant and should not be considered in determining the effect of the statute upon those coming under its provisions.

In 2 Sutherland, Statutory Construction, § 5005, (3rd Ed. 1943) it was stated as follows:

"However, the committee report cannot be taken as giving to the statute a meaning not fairly within its words." 3

3. "United States v. Burden Smith & Co., 33 F. (2d) 229 (CCA 5th, 1929); Banco Mexicano de Commercio E. Industria v. Deutsche Bank, 289 Fed. 924, 53 App. D. C. 266 (1923); see St. Louis, I. M. & S. Ry. v. Craft, 237 U.S. 648, 661, (1915); Hoover v. Intercity Radio Co., 286 Fed. 1003, 1006, 52 App. D. C. 339 (1923).

"Where the terms of a statute are clear and unambiguous, the legislative intent must be derived therefrom, not withstanding the intent expressed therein conflicts with the pur-

pose of the statute as set forth in committee reports of Congress. Caminetti v. United States, 242 U. S. 470, 490, 61 L. Ed. 442, 37 Sup. Ct. 192 (1917); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 83, 77 L. Ed. 175, 53 Sup. Ct. 42 (1932); Helvering v. City Bank Farmers Trust Co., 296 U.S. 85, 89, 80 L. Ed. 62, 56 Sup. Ct. 70 (1935)."

Finally, in showing the inconsistency of the arguments of the United States Government and the Interstate Commerce Commission and in proving that the intent of Congress was not to limit "grandfather" authority to the eleven (11) enumerated commodities a brief analysis of Section 7 (b) of the Transportation Act of 1958 must be included. Section 7 (b) of Transportation Act of 1958, 72 Stat. 574, 49 U.S.C. § 303 (b) (6), provides as follows:

> "Unless otherwise specifically indicated therein, the holder of any certificate or permit heretofore issued by the Interstate Commerce Commission, or hereafter so issued pursuant to an application filed on or before the date on which this section takes effect, authorizing the holder thereof to engage as a common or contract carrier by motor vehicle in the transportation in interstate or foreign commerce of property made subject to the provisions of part II of the Interstate Commerce Act by paragraph (footnote omitted) (a) of this section, over any route or routes or within any territory, may without making application under that Act engage, to the same extent and subject to the same terms, conditions and limitations, as a common or contract carrier by motor vehicle, as the case may be, in, the, transportation of such property, over such route or routes or within such territory, in interstate or foreign commerce."

This Section of the Transportation Act of 1958 amending Section 203 (b) (6) of the Interstate Commerce Act in effect grants (retroactive and or "grandfather) authority to any carrier holding a certificate prior to the effective date of the Transportation Act of 1958 for all commodities subject to Section (7) (a) of the Transportation Act of 1958. Certainly Congress did not intend to favor a certificated carrier over other carriers who had previously not been subject to economic regulation and, of course, it was intended that each would receive authority to perform operations of those commodities subject to Section 7 (a) of the Transportation Act of 1958. A certificated carrier, such as a carrier holding general commodity authority, would not have included in his certificate the right to perform transportation of formerly exempt commodities as no authority was ever issued for commodities not subject to economic regulation. However, Congress provided in Section 7 (b) of the Transportation Act of 1958 that such a carrier would be permitted to continue or even commence new operations in the transportation of all commodities subject to the provisions of Section 7 (a) of the Transportation Act of 1958 whether or not such commodities were exempt or not exempt prior to the enactment of the amendment and whether or not an administrative or judicial order had been issued proclaiming the status of the individual commodities.

It is interesting to note that under Secion 7 (b) of the Transportation Act of 1958 a carrier authorized to perform the transportation of general commodities would be granted authority automatically to perform transportation of all commodities subject to the entire provisions of Section 7 (a) of the Transportation Act of 1958, and this would be true without the folowing enumerated procedures:

(a) It would not be necessary to file an ap-

plication with the Interstate Commerce Commission.

(b) It would not be necessary to notify other motor carriers or the utility commissions of the various states in which operations would be conducted.

(c) It would not be necessary to prove that transportation of such commodities had ever been transported either prior to or after the effective date of the Transportation Act of 1958.

(d) It would not be necessary to publish notice in the Federal Register as required of all other carriers including those claiming "grandfather" rights under Section 7 (c) of the Transportation Act of 1958.

(e) It would not be necessary to apparently even file a tariff describing the rates for such transportation.

Certainly Congress intended at least equal protection for those carriers subject to Section 7 (c) of the Transportation Act of 1958 and to have prescribed otherwise would be unfair and in fact violate the constitutional rights of such carriers subject only to Section 7 (c) of the Transportation Act of 1958. No such discrimination could possibly be intended.

Section 7 (c) of the Transportation Act of 1958 does provide that an application must be filed. (Such application was timely filed by Milk Transport, Inc.) However, Section 7 (c) of the Transportation Act of 1958 prescribes that a certificate shall issue "without further proceedings". In the present proceeding Milk Transport, Inc. was not even permitted to proceed under its duly filed application even though the statute specifically provides that no proceeding was required. If under Section 7 (b) of the Transportation Act of 1958, any carrier may commence or continue to perform transportation of the commodities subject to the provisions of Section 7 (a) even though such transportation had never

been conducted in the past then all of the more so the arbitrariness and inconsistency of the Interstate Commerce Commission is revealed by its requirement of further proceedings but to deny the right to perform operation by summarily rejecting an application duly and timely filed.

SUMMARY

The lower court, and the Appelees under their interpretation and argument were and are in error for the following reasons as more fully set forth above, but as summarized below.

(a) There is no justification for limiting "grandfather" authority to the property *formerly exempt* as Section 7 (c) of the Transportation Act of 1958 is not so written. Further the exempt or not exempt status of the commodities listed in the Commodity List of of Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission, had never been legally established prior to enactment of the Transportation Act of 1958.

(b) There is no justification for limiting "grandfather" authority to those commodities *returned to regulation*. As shown above the eleven (11) enumerated commodities set forth in the second proviso of Section 7 (a) of the Transportation Act of 1958, were *not returned* to regulation by the Transportation Act of 1958. They never were lawfully subject to economic regulation. (see Cases cited supra in paragraph (b).

(c) There is no justification for limiting the "grandfather" authority to those eleven (11) commodities of those specified in the second proviso of Section 7 (a) of the Transportation Act of 1958 as the language contained in Section 7 (c) of the Transportation Act of 1958 is clear and not ambiguous and the primary purpose of the enactment of the first

proviso of Section 7 (a) of the Transportation Act of 1958 was to subject all the commodities shown in the Commodity List of Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission to its provisions.

(d) Finally, there is no justification for interpreting Section 7 (a) of the Transportation Act of 1958 so as to apply and determine the status prior to the enactment of the Act as to whether the individual commodities were exempt or not exempt. The plain word "shall" which applies to the future only proceeds both the first proviso and the second proviso of Section 7 (a) of the Transportation Act of 1958.

CONCLUSIONS

By this brief Amicus Curiae there have been set forth the provisions of the Transportation Act of 1958 applicable to the issues involved on appeal and the issues should be resolved in favor of apellant by the noting of probable jurisdiction in that lower court erred in concluding and deciding as a matter of the law that no carrier, including appellant, Milk Transport, Inc., is entitled to any "grandfather" authority under Section 7 (a) and Section 7 (c) of the Transportation Act of 1958 except for eleven (11) commodities of those specifically named and listed in the second proviso of Section 7 (a) of the

Transportation Act of 1958.

Respectfully submitted,

Harold S. Shertz
Paul F. Barnes
226 South Sixteenth Street
Shertz, Barnes & Shertz
Philadelphia 2, Pennsylvania

September 1, 1961

CERTIFICATE OF SERVICE

I, Harold S. Shertz, one of the attorneys for petitioner, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the first day of September, 1961 I served copies of the foregoing documents on the several parties hereto, as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, with mailing postage prepaid to Solicitor General, Dept. of Justice, Washington 25, D.C., Robert A. Biggs, Ass. Attorney General, and John H. D. Wiggers, Attorney, and by mailing thereof, in duly addressed envelope, postage prepaid to Miles Lord, U.S. Attorney, Federal Courts Bldg., St. Paul, Minnesota.

2. On the Interstate Commerce Commission by mailing copies thereof, in duly addressed envelopes with postage prepaid, to Robert W. Ginnane, General Council, and Fritz Kahn, Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On the Intervenors, by mailing a copy threof, in duly addressed envelopes with postage prepaid to Frank B. Hand Jr., Esq. and Daniel B. Johnson, Esq., Transportation Bldg., Washington 6, D.C.

4. On appellant, by mailing a copy thereof, in duly addressed envelope with postage prepaid to Donald A. Morken, Esq., 1000 1st National Bank, Bldg., Minneapolis, Minnesota.

Harold S. Shertz

Of Counsel:
Shertz, Barnes & Shertz
226 S. 16th St.
Philadelphia 2, Pa.

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